Ben Venue Laboratories, Inc. *and* International Chemical Workers Union. Cases 8–CA–25920 and 8–RC–14955

June 22, 1995

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The judge in this case[1] has found that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about union activities, by threatening to withdraw an existing benefit, by promising benefits to induce employee opposition to the Union, and by imposing discriminatory no-solicitation rules. He further found those unfair labor practices that occurred during the critical preelection period interfered with employee free choice in the election. He therefore recommended sustaining the Union's objections to such conduct and setting aside the results of the election held on October 29, 1994. The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings[3] and conclusions, except as discussed below, and to adopt the recommended Order, as modified.[4]

The judge found that the Respondent's president and chief operating officer, Thomas Russillo, violated Section 8(a)(1) of the Act by telling employees that the Respondent's ''open-door policy'' would no longer exist if the employees voted to unionize.[5] ''The Board has held that an employer does not violate the Act by informing employees that unionization will bring about 'a change in the manner in which employer and employee deal with each other,' *Tri-Cast, Inc.*, 274 NLRB 377 (1985), or by statements informing employees of a 'loss of access to management.' *Koons Ford of Annapolis*, 282 NLRB 506 (1986).'' *SMI Steel, Inc.*, 286 NLRB 274 (1987). *KGI Fibers*, 280 NLRB 473 (1986) (No violation when the Employer told employees that ''there would not be any more open door policy if the Union was voted in because they'd have to go through union procedures, like grievances.'') Assessing Russillo's statement in light of these cases, we conclude that it did not constitute an unlawful threat. Accordingly, we dismiss the complaint allegation and overrule the election objection relating to this conduct.

Our dissenting colleague seeks to draw a distinction between statements concerning a change in Respondent's ''open-door'' policy, and statements concerning the elimination of it. We disagree. The distinction is not made in the cited cases. Indeed, in *SMI Steel*, the facts would not even support such a distinction.[6] In any event, we do not agree that Respondent's conduct would establish a violation in this case. Respondent's extant policy permits an employee to discuss a grievance with various representatives of the Respondent. There is no requirement for third-party intrusion and there is no need to conform a grievance adjustment to a collective-bargaining agreement. The existence of a Section 9 representative would impose those requirements and, to this extent, would alter the current system. In our view it was not objectionable for Respondent to point this out. In this regard, we note that Respondent told employees that the extant policy could not continue because it fails to give the Union its appropriate role.[7] On a second occasion, the Respondent informed employees that if the Union came in, there would no longer be an open-door policy. That statement is to be understood in the context of the first one. In any event, both statements were lawful and accurately reflected the effect that 9(a) representation would have on the Respondent's policy. *SMI Steel*, above; *FGI Fibers*, above. Our dissenting colleague would require that Respondent say more. She would apparently require that Respondent give employees a detailed and precise explanation of the change wrought by Section 9 representation. We believe that *FGI Fibers* clearly rejects this argument.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ben Venue Laboratories, Inc., Bedford, Ohio, its officers,

[1] On September 14, 1994, Administrative Law Judge David L. Evans issued the attached decision. The Respondent and the Union each filed exceptions and supporting briefs. The General Counsel and the Union each filed briefs in opposition to the Respondent's exceptions. The Respondent filed a brief in opposition to the Union's exceptions. The Union filed a reply brief and first and second notices of additional authority.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] We deny the Respondent's motion to introduce exhibits R–3 and R–24 into the record.

[3] The Respondent and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] In accord with the Union's exceptions, we shall modify the judge's recommended Order and notice language to include appropriate provisions relating to the Respondent's unlawful grant of the benefit of free prescription safety glasses.

[5] Specifically, the judge found that Russillo stated at one employee meeting that ''if the Union did get in, that we would not have that open-door policy that we have with the company now . . . we would lose that because the Union would have to do the negotiation for us.'' Russillo also stated at a second meeting that if the Union came in ''there would no longer be an open-door policy.''

[6] Accordingly, our colleague would overrule that case.

[7] See fn. 4 above.

agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the following paragraphs accordingly.

2. Insert the following as paragraphs 1(d) and (e).

''(d) Granting employees prescription safety glasses or any other benefits in order to dissuade employees from becoming or remaining members of the Union or from giving any assistance or support to it.

''(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.''

3. Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

MEMBER BROWNING, dissenting in part.

Contrary to my colleagues, I would find that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by telling employees that the Respondent's open-door policy would no longer be available to them if they selected the Union as their collective-bargaining representative. In all other respects, I join my colleagues' decision.

As found by the judge, the Respondent's employee handbook contained a grievance resolution procedure whereby employees were told to address problems to their immediate supervisor. If a satisfactory resolution is not reached the employee may contact the next level of supervision, then the personnel department, and then the Respondent's president. An employee may skip intermediate steps and contact any management member in ''unusual circumstances.'' The judge credited employee testimony that the Respondent's president told employees that ''if the Union would come in there would no longer be an open door policy.''

My colleagues rely on *FGI Fibers*, 280 NLRB 473 (1986), and *SMI Steel*, 286 NLRB 274 (1987), and cases cited therein,[1] in support of their conclusion that this did not constitute an unlawful threat. I find these cases distinguishable.

In *SMI Steel*, the Board found that the employer's general manager's speech to employees[2] did not violate Section 8(a)(1) of the Act. In so finding, the Board stated that it assessed the statement in light of *Tri-Cast*[3] and *Koons Ford*,[4] but did not explain why its holding followed from those cases.

In *Tri-Cast*, the Board found that it was lawful for an employer to explain to employees that ''when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before'' because Section 9(a) ''contemplates a change in the manner in which employer and employee deal with each other.'' The Board found that the employer's statement ''simply explicates one of the changes which occur between employers and employees when a statutory representative is selected.'' 274 NLRB at 377.

Although I agree with the rationale underlying *Tri-Cast*, I construe that case narrowly. I do not agree that *Tri-Cast* compels us to sanction statements such as the one at issue in the instant case that go beyond merely explicating a change in the relationship between employer and employee, and threaten a total elimination of an employer's established open-door policy. Although Section 9(a) would require a change in an employer's open-door policy, it would not require a termination or suspension of the entire policy. The provisos to Section 9(a) explicitly provide that individual employees or groups of employees would continue to have the right to present grievances to their employer and to have their grievances adjusted. Those provisos require only that any grievance adjustment not be inconsistent with the terms of a collective-bargaining agreement in effect and that the bargaining representative be given the opportunity to be present at the grievance adjustment.

In my view, the Respondent's statement that the open-door policy would be eliminated was not merely a statement explicating the change in the relationship between employee and employer required by Section 9(a), but instead constituted a threat to discontinue a benefit that Section 9(a) would not require the employer to discontinue in its entirety.[5] Accordingly, I

[1] *Tri-Cast, Inc.*, 274 NLRB 377 (1985); *Koons Ford of Annapolis*, 282 NLRB 506 (1986), enfd. mem. 833 F.2d 310 (4th Cir. 1987).

[2] The general manager stated that ''[y]ou would not be permitted to take advantage of an opportunity to come all the way to my front office and sit down and talk to me, because you would be prevented from doing that under the contract that you would be [sic] a participating member with the Union. You would be locked into the acts and the decisions of an executive committee of a Union.'' 286 NLRB 274 at fn. 3.

[3] In *Tri-Cast*, the employer distributed a letter to employees stating, ''We have been able to work on an informal and person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing.'' 274 NLRB at 377.

[4] *Koons Ford* applied *Tri-Cast* and found that a general manager's statement to employees that ''if the Union got in he would not be able to talk directly to the employees as he had been doing but would have to go to the Union'' did not constitute unlawful conduct.

[5] My colleagues note that the existence of a Sec. 9 representative would alter the Respondent's current system. Had the Respondent's statement clearly set forth the modifications required by law I would agree with my colleagues that under *Tri-Cast* the statements would not be lawful or objectionable. The Respondent's statement at issue, however, was not so limited.

Although my colleagues contend that ''the Respondent told employees that the extant policy could not continue because it fails to give the Union its appropriate role,'' I note that the employee testimony credited by the judge and relied on by my colleagues indicates

Continued

find that by making this threat the Respondent has violated Section 8(a)(1) and has engaged in objectionable conduct.[6]

that at one of the meetings the Respondent's president stated only that if the Union came in ''there would be no longer an open door policy.'' Thus, at least at one employee meeting there was no further explanation given concerning the Union's appropriate role. My colleagues suggest that I would require that Respondent give a ''detailed and precise explanation of the change wrought by Section 9 representation.'' I need not attempt at this point to characterize the type of explanation I would find sufficient, because I have no difficulty finding that here, when no explanation whatsoever was given in at least one employee meeting, the Respondent went beyond the lawful description of a change and suggested total elimination of the policy.

[6] I find *FGI Fibers*, relied on by the majority, to be distinguishable. In my view, the statement at issue in that case contemplated a change, rather than a total elimination, of the open-door policy.

To the extent that *SMI Steel* can be read as sanctioning an employer threat to completely eliminate an open-door policy rather than merely change it, I would overrule that case as an unwarranted extension of *Tri-Cast*.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you about your union membership, activities, or desires.

WE WILL NOT promise you prescription safety glasses, or institution of a second work shift, or any other benefits, in order to dissuade you from becoming or remaining members of a union or from giving any assistance or support to it.

WE WILL NOT grant you prescription safety glasses or any other benefits in order to dissuade you from becoming or remaining members of a union or giving any assistance or support to it.

WE WILL NOT impose discriminatory rules against soliciting for a union on working time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BEN VENUE LABORATORIES, INC.

Nancy Butler, Esq., for the General Counsel.
Martin S. List, Esq., of Cleveland, Ohio, for the Respondent.
Randall Vehar, Esq., of Akron, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Cleveland, Ohio, on May 16–18, 1994. On August 19, 1993,[1] International Chemical Workers Union (the Union, the Petitioner, or the Charging Party) filed a petition in Case 8–RC–14955 seeking a Board election and certification as the collective-bargaining representative of certain employees of Ben Venue Laboratories, Inc. (the Employer or the Respondent). An election was held on October 29; the tally of ballots reflects:

Approx. No. of eligible voters	206
No. of void ballots	0
No. of votes cast for Petitioner	61
No. of votes cast against union	134
No. of valid votes counted	195
No. of challenged ballots	2
Votes counted plus challenged ballots	197

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has not been cast for Petitioner.

On November 4, the Union filed objections to conduct of the employer affecting results of the election (the objections).

On November 5, the Union filed the charges in Case 8–CA–25920 alleging that Respondent had violated Section 8(a)(1) of the Act by various acts and conduct. On December 30, the General Counsel issued a complaint based on those charges. On January 26, 1994, the Regional Director issued an order consolidating the representation and complaint cases and directing a hearing on both. The objections are factually coextensive with the 8(a)(1) allegations of the complaint.

On the entire record and my observation of the demeanor of the witnesses, and after considering the briefs that have been filed, I make the following findings of fact[2] and conclusions of law.

I. JURISDICTION

Respondent, a corporation, is engaged at Bedford, Ohio, in the business of manufacturing pharmaceuticals. Annually, Respondent ships goods valued in excess of $50,000 directly to customers located at points outside the State of Ohio. Therefore, Respondent is an employer engaged in commerce

[1] All dates mentioned are in 1993 unless otherwise indicated.

[2] Passages of the transcript have been electronically reproduced. Proper punctuation of transcript quotations is supplied only where necessary to avoid confusion.

within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The following individuals are admitted by Respondent to be supervisors within the meaning of Section 2(11) of the Act: Thomas Russillo is Respondent's president; David Henderson is the production manager; and Rick Lascala and Frank Polisena are production supervisors.

1. Alleged interrogation by Lascala

The complaint, paragraph 6, alleges that Respondent, by Lascala, interrogated an employee in violation of Section 8(a)(1). In support of this allegation, General Counsel called Edward Rolko. Rolko is a sanitation department employee who had been employed by Respondent for 7 years at time of trial. Rolko testified that in August, a few days before the petition in the representation case was filed, he was in Lascala's office when

> [Lascala] asked me if I attended a meeting in the park about a Union and if Kevin Hoisack was the one who made the call. . . .
>
> I told him I knew nothing. . . .
>
> Well, he told me that, you know, since we were friends, you know, I could—I could trust him, you know, talk to him and tell him what I knew. . . .
>
> I told him—I says, ''I know nothing.''

Lascala was not called by Respondent, so Rolko's testimony stands undenied, and I found Rolko credible as he gave the testimony.

2. Alleged September discriminatory no-solicitation rule

It is undisputed that, until the events of this case, Respondent's employees were free to talk about anything during working time. Moreover, it is undisputed that sales of candy, Tupperware, and catalogue items are conducted on working and nonworking time. As amended at trial, the complaint, paragraph 8, alleges that in September Respondent by Lascala imposed on employees a rule against talking about the Union on working time[3] while permitting discussions and solicitations about other topics on working (and nonworking time). The General Counsel called Rolko and Patricia Stevens, who is also currently employed by Respondent, in support of this allegation.

Both Rolko and Stevens testified that in September, while they were talking about how wet Rolko had gotten performing a task outdoors during a rainstorm, they were approached by Lascala. As Rolko testified, ''[Lascala] told me I was not allowed to solicit people for the Union on Company time.'' Rolko further testified that, after the confrontation with Lascala, his immediate supervisor (who went unnamed) indicated to him that she had heard about the incident and told Rolko to ''be careful.''

Again, Lascala was not called to testify by Respondent. I found the testimony of Rolko and Stevens to be credible.

3. Speeches by Russillo and grant of prescription safety glasses

Beginning in late September and continuing until October 28, Thomas Russillo, Respondent's president and chief operating officer, gave a series of speeches to the production and maintenance employees. Russillo testified that he gave speeches on four topics, which he described as: (1) ''the culture of Ben Venue. And who we were, and why we were. And what we were. And how Ben Venue felt about having a Union''; (2) the election processes and the ''mechanics'' of collective bargaining; (3) strikes and the impact of strikes on companies; and (4) ''we reviewed everything we had covered up until then.'' The employees were divided into five groups; therefore, 20 speeches were given. Russillo entertained questions from employees during the speeches.

The complaint, paragraph 9, alleges that in Russillo's speeches Respondent: (1) promised employees that it would institute a second shift (that would mitigate the burden of unwanted overtime on first-shift employees); (2) promised employees the benefit of free prescription safety glasses; (3) threatened the employees with a loss of the right to confer with Respondent about grievances; and (4) threatened the employees with loss of wages and other benefits if they selected the Union as their collective-bargaining representative. The complaint further alleges that, in November, Respondent granted to employees the benefit of prescription safety glasses. All of these things were done, the complaint and the objections allege, in order discourage employees from supporting the Union.

In support of these allegations, General Counsel called: (1) Rolko, who is mentioned above, (2) David Roth, a technician in the sterile room, (3) Velma Kara, an inspector and material-handler in the packaging department, (4) Phyllis Vosar, an inspector in packaging, (5) Laura Orosz, a line technician in packaging, and (6) Dorothy Gatheright, a line technician in packaging. (All of these witnesses are ''current employees,'' as I shall call them; they were employed by Respondent at time of trial.) Respondent's employees were usually grouped by departments when scheduled to hear the Russillo speeches, but there were exceptions, and, at certain points, it cannot be told if any of the witnesses were testifying about the same meetings when they testified that Russillo said one thing or another on a given topic.

In defense of the 8(a)(1) allegations based on what Russillo said in his speeches, Respondent called: (1) Gerald Walker, a technician in the maintenance department; (2) Mary Julien-Crew, a chemist; and (3) Russillo.

a. *Promise of a second shift*

Roth testified that before the Russillo speeches began, the sterile room employees had been working a great deal of unwanted overtime and, several of them had asked members of supervision that something be done to alleviate the situation. Roth further testified that at the first campaign meeting conducted by Russillo for the sterile room employees:

[3] Actually, the complaint uses the phrase ''on company time'' (without the quotation marks) which is vague. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Respondent did not object, however, or move to strike.

> [We] asked, as workers in my department, if there would be any way that they could add a second shift on to try to take some of the work load off of us. . . .
>
> [Russillo] said at that time they couldn't put on another second shift in our department because it wouldn't be fair to hire people for later on [and] that we would slow down again in work and they would just have to lay those people off.

Roth further testified that at the second Russillo meeting that he attended, Russillo told the employees:

> That they would now be hiring a second shift. . . . That he would take volunteers from anybody from first shift who would be willing to go to second, because I guess they wanted some experienced people to help with the training a little bit, and there would be a fifty cent an hour shift premium for those coming in now on second shift.

Roth testified that, before this second meeting, no member of management had indicated that a second shift might be instituted to alleviate the overtime burden about which the sterile room employees had complained.

Although Kara was a packaging department employee, the first Russillo meeting that she attended was a meeting of the sterile room employees. Kara testified that Russillo started the meeting by asking the employees ''why they were so unhappy and why they wanted the Union.'' The sterile room employees, according to Kara, complained to Russillo that they were working entirely too many hours. According to Kara,

> And he says we'll solve that . . . because we will put on a second shift with a fifty cent differential and we will first ask for volunteers and if we can't get any volunteers we will hire people and train them.

Orosz testified that in the second meeting of the packaging employees that Russillo conducted:

> [Russillo] talked about putting on a second shift and they were paid 50 cents more an hour. When the second shift was put on, it would take away overtime hours for those who wanted [sic] to work overtime hours.

Russillo agreed with Roth that a possible second shift was discussed at two meetings; however, his account of the first meeting differs significantly; Russillo testified:

> We, at that point in time [the first series of meetings], were asked, were we going to hire more employees. And we said we were looking at it, as we always did. And, when the workload, the volume of production, justified it, we would go ahead and do that.
>
> At the second (2nd) meeting, that same subject came up again. We had just received some additional contract work. And we advised the employees that, because of the sustained volume we were seeing, we were anticipating hiring some more employees. To replace, basically, the temporary employees we were already hiring. We had already hired.

Russillo did not deny that in his second series of meetings he announced a 50-cent-per-hour premium for the new second shift; nor did he deny announcing that current employees would be given first opportunity to take benefit of that premium by volunteering before Respondent hired new employees.

Roth was credible in his testimony that when Russillo was first asked if Respondent could add a second shift Russillo replied that it could not (because it would be ''unfair'' to the new hires who later would have to be laid off). Also, Respondent produced no records to support Russillo's statements that after his first meeting with the employees, and before the second series of meetings, Respondent had ''just received'' some new orders.[4] I credit Roth, Kara, and Orosz.

b. *Promise and grant of prescription safety glasses*

Before the events of this case, Respondent provided prescription safety glasses to some, but not all employees. It had also provided goggles and nonprescription safety glasses for all employees.

Roth testified that during the first Russillo speech that he attended:

> Topics was brought up about safety glasses, that we were now going to receive. . . . That all employees would be receiving free, no charge safety glasses. The Company gave you four or five pairs to choose from if you were not prescription glass wearer, which I am not. So those are the ones I chose.
>
> And if you did wear glasses that they would pay for the prescription safety glasses but if wanted additional frames, you know, that were more expensive then they would be available at your cost.

Gatheright testified that ''in the past we had been asking for eye care.'' Gatheright further testified that at the first Russillo meeting that she attended, employee Linda Lenhart spoke up and said that the employees needed prescription safety glasses ''because we use our eyes on our job.'' According to Gatheright, ''the president [Russillo] did say that they had been talking about a new policy whereas we would get prescription safety glasses . . . [H]e would look into it because they were upgrading our health benefits.'' Rolko, Kara, and Orosz also testified that Russillo said at October meetings that they attended that employees would be receiving free prescription safety glasses. Orosz further testified that Russillo said that the prescription safety glasses would be free if the employees provided their prescriptions. Each of these employees testified that they did, in fact, receive prescription safety glasses after the meetings (which ended the day before the election).

On behalf of Respondent, maintenance employee Gerald Walker testified that, before October 1993, employees in his department had been provided prescription safety glasses. Walker further denied that prescription safety glasses were mentioned in the meetings that he attended. Chemist Julien-Crew testified that she could not recall mention of prescription safety glasses in the Russillo meetings that she attended.

[4] Respondent did produce some testimony that unexpected orders had been received during the summer, but this was at least a month before the first series of Russillo meetings began.

Russillo flatly denied that prescription safety glasses were discussed during the meetings. He further testified that some employees had, before the organizational attempt by the Union, received prescription safety glasses when they requested them.

Julien-Crew's lack of memory and Walker's testimony that prescription safety glasses were not mentioned in the meetings that he attended are not probative denials of what Roth, Rolko, Gatheright, Kara, and Orosz said that they did hear in the meetings that they attended. Roth, Rolko, Gatheright, Kara, and Orosz are current employees who are afforded a presumption of credibility;[5] also, and I do not believe the testimony of Russillo that prescription safety glasses were not mentioned at all in his meetings. I credit Roth, Rolko, Gatheright, Kara, and Orosz on this issue.

c. *Threatened loss of the right to confer about grievances*

Respondent's employee handbook contains a grievance resolution procedure. Employees are told that they should address problems to their immediate supervisor; if a satisfactory resolution is not reached, the employee can contact the next level of supervision, then the personnel department, then the company president (Russillo). The stated procedure concludes that the employee may skip the intermediate steps and contact any management member in ''unusual circumstances.''

Gatheright testified that at the first Russillo meeting that she attended:

> He also stressed throughout, if the Union did get in, that we would not have that open door policy that we have with the company now. . . . [H]e said that we would lose that because the Union would have to do all the negotiations for us.

Kara also testified that at the second Russillo meeting that she attended, ''Mr. Russillo stated that if the Union would come in there would be no longer an open door policy.''[6]

Russillo was asked on direct examination about his statements about Respondent's open-door policy, and he testified:

> [M]y recollection is that, it came up as a result of a question, rather than part of an organized speech.
>
> But it, either way, I can tell you what we discussed. We discussed the fact that it's always been Ben Venue's culture. And that I had been hired by my predecessor, because we had an open door policy. And I was sensitive to working with people directly.
>
> And that, if a Union was in fact voted in, the Union representative would be required at all meetings that dealt with Company policy.

The testimony of Kara and Gatheright was simple enough; they testified that Russillo told the packaging employees that they would lose the benefit of the Respondent's open-door policy if the Union was selected as their collective-bargaining representative. In reply to this simplistic testimony, Russillo testified that he gave the vague answer quoted above. To the extent that Russillo's testimony was intended to constitute a denial of the testimony by Kara and Gatheright, I discredit it. I do credit the testimony of the employees on the topic.

d. *Threatened loss of benefits*

Roth testified on direct examination that during the first Russillo speech that he attended: ''Other topics were if a Union did get elected our benefits, our hourly wage would be up for grabs. That everything would have to start from scratch.''

On cross-examination, Roth was asked, and he testified:

> Q. (Russillo) discussed that if the Union were voted in, the Company and Union would have to negotiate, try to negotiate a contract, correct?
>
> A. He said something to that effect.
>
> Q. Okay. And he also said that as a result of those negotiations nobody can say, sitting there at the time he was making the speech, whether the wages and benefits would go up or down, correct?
>
> A. Yeah, he quoted a lot, saying that other pharmaceutical companies might not want to deal with us because they don't like to deal with the Union.
>
> Q. That's not my question, sir. My question is, did he say that during those negotiations wages might go up or down?
>
> A. He said everything would be up for grabs.
>
> Q. Okay.
>
> JUDGE EVANS: Now, did he say wages and benefits might go up or down, as well?
>
> THE WITNESS: Both.
>
> JUDGE EVANS: He said both. Next question.

It appeared to me that Roth was prepared to testify to nothing other than the ''up for grabs'' phrase, even if he actually remembered more. Roth attempted the ''other pharmaceutical companies'' evasion when asked to complete his quotation of Russillo, and he acknowledged what else Russillo said only when pinned down. Roth was not credible in this portion of his testimony.

Rolko testified that in a meeting that he attended:

> I believe—know of one case where an employee asked Mr. Russillo what would happen if the Union was elected in today, would our benefits and wages remain the same. And Mr. Russillo replied that, you know, Ben Venue could do anything they wanted to. ''We could cut your wage to minimum wage if we wanted to.'' But he said, ''we wouldn't do that.''

On cross-examination, Rolko was asked, and he testified:

> Q. And what [Russillo] said about bargaining was that if the Union won the Company would have to sit down and bargain with the Union, correct?
>
> A. Yes.
>
> Q. And he also said that during those negotiations all items of wages and benefits and conditions of employment were up for grabs, isn't that what he said?

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[5] *Georgia Rug Mill*, 131 NLRB 1304 (1961); *Gold Standard Enterprises*, 234 NLRB 618 at 619 (1978). Unless otherwise indicated, I afford this presumption to all witnesses who are current employees.

[6] Kara credibly denied that Russillo told the employees at the meeting that she attended that changes in the open-door policy would have to be made because of the law.

A. Yes.

Q. And he also said that wages could be—and benefits could be negotiated up or they might do down.

A. Correct.

Q. And he also said nobody knew what would happen. That would depend on the negotiations, correct?

A. Correct.

Q. And in fact, you received literature that confirmed that to you from—that that was the—what the Company described the bargaining process as?

A. Yes.

Russillo's testimony of what he said about bargaining is almost precisely what Rolko admitted on cross-examination.

Gatheright was not asked by General Counsel what Russillo said about bargaining during the meetings that she attended. On cross-examination, Gatheright was asked and she testified:

> Q. Do you recall anything that was said there?
>
> A. About the negotiations? Everything would be on the table if the Union did come in and we would start from scratch. . . .
>
> Q. And do you recall Mr. Russillo saying at that time that—to define what he meant by ''scratch''? He meant that everything would be subject to negotiations and nobody could tell what would happen in those negotiations?
>
> A. Yes.
>
> Q. And that was in response to clarifying what he meant by ''scratch''? Is that what you're testifying?
>
> A. Scratch, yes.

Kara was emphatic on direct examination that Russillo stated that the employees ''stand to lose'' different benefits during bargaining, but she, too, acknowledged on cross-examination that: ''[Russillo] said we would lose some things and we would gain some things. . . . He said we could stand to lose and we could stand to gain. That's how he said it.''

Orosz testified that in a Russillo meeting that she attended: ''About if the Union was voted in, the first thing that would happen, you would go out on strike and you'd have to start from scratch to get your wages and benefits.''

Orosz testified that she could not remember Russillo explaining what he meant by the last-quoted statement, although she did acknowledge receiving Respondent's literature that correctly described the bargaining processes.

Because of the quoted admissions of General Counsel's witnesses on cross-examination, I cannot, and do not, accept as credible testimony only what they said on direct. I credit Russillo's denials of the relevant portions of those direct testimonies. I recommend dismissal of the complaint allegations and the objections in this regard.

4. Alleged October discriminatory no-solicitation rule

As amended at trial, the complaint, paragraph 11(b), alleges that Respondent, by Polisena, discriminatorily imposed on employees a rule against talking about the Union during working time while permitting talking and commercial solicitations during working time. Gatheright testified that in October, before the election, Supervisor Polisena called the 40 packaging department employees together and Polisena said:

> Well, in that particular meeting we had, he asked that the pro-union people would refrain from discussing our concerns to the non-union protestors because we were upsetting them.

Polisena testified that he and Lascala conducted such a meeting. (Again, Lascala did not testify.) Polisena testified that before the meeting employees, including specifically a prounion employee, had complained to him that arguments about the Union were causing distractions in the workplace. Polisena testified that he did no more than tell the employees that they should not argue while working. Polisena acknowledged that he had witnessed no such arguments himself, even though his work area is proximate to the employees' work area.

Respondent failed to produce any witness to corroborate Polisena in his testimony that arguments on the job (about the Union or anything else) had been conducted in the packaging area. Additionally, although given several opportunities to do so, Polisena did not deny that he told the group that the ''pro-union people'' should stop ''discussing'' their positions with the antiunion employees (or ''non-union protesters,'' as Gatheright coined the phrase). To the extent that Polisena's testimony can be argued to contain such a denial, I discredit it. I credit Gatheright.

5. Production of ''Vote-No'' buttons

The complaint, paragraph 11(a), alleges that during October Respondent, in violation of Section 8(a)(1):

> permitted an employee to manufacture and distribute anti-union buttons in the production manager's office during the employee's working time while enforcing its no-solicitation, no-distribution policy against pro-union employees.

Rolko testified that laminated ''Vote No'' buttons were worn by some employees during the campaign, that employee Donna Lantos works in an area in which laminating equipment is maintained for business purposes, that Lantos' work area is just outside Production Manager Henderson's office, and that he saw Lantos passing out such laminated buttons in her work area. Rolko did not testify that he ever saw Lantos, or anyone else, produce the buttons; and Rolko certainly did not testify that he witnessed a supervisor in the area when such laminated buttons were being produced, by Lantos or anyone else. Nor did Rolko testify that any supervisor was present when Lantos passed out the laminated buttons. No other testimony was offered in support of this allegation. The General Counsel and the Union would have the Board infer that Lantos produced the buttons; they would further have the Board infer that Henderson (or some other supervisor) knew that Lantos produced the buttons. This is at least one inference too many on which to base the requested factual finding. I shall recommend dismissal of the complaint allegations and objections on this topic.

B. *Analysis and Conclusions*

I have recommended dismissal of certain allegations of the complaint and the objections on the basis of failures of evidence. The remaining allegations will be dealt with in this section of the decision.

A few days before the petition was filed, Lascala asked employee Rolko if he had attended a certain meeting and if employee Hoisack was the one who had contacted the Union to get the organizational attempt started. Rolko demurred, but Lascala was insistent: he badgered Rolko with the assurance that he could be trusted because he and Rolko had been friends. This persistent questioning was an interrogation in violation of Section 8(a)(1), as I find and conclude; however, as the interrogation occurred before the petition was filed on August 19, it is not the basis for a valid objection to conduct affecting the results of the October 29 election. *Ideal Electric*, 134 NLRB 1275 (1961).

Before the organizational attempt, the employees had complained about two things that became subjects of Russillo's meetings, the amount of overtime that some employees were working and the failure of Respondent to furnish some employees with prescription safety glasses. In his speeches, Russillo promised to remedy both grievances. He told the employees, for the first time, that there would be a second shift. (And Russillo told the employees that those who volunteered for the new second shift would receive an hourly premium of 50 cents.) Russillo further announced that prescription safety glasses would be available to those who had not, theretofore, received them. Russillo had opened at least one meeting by asking the employees why they wanted a union, according to the undisputed testimony of Kara, so the inference could not be missed—Respondent was bartering for votes with Russillo's promises. Even without such testimony, however, I would, and do, find that the employees would reasonably conclude that Russillo's promises were offered in exchange for votes. An attempt to sway them with the exercise of raw economic power. By Russillo's promise of a new second shift, and by his promise of prescription safety glasses for all employees, Respondent violated Section 8(a)(1), as I find and conclude. I further conclude that this unlawful conduct was likely to affect the results of the October 29 election.

Even Russillo admitted telling the employees that they would no longer be free to talk to him (or other supervisors) if the discussions ''dealt with Company policy.'' By including all possible topics that affected ''Company policy,'' Russillo was including everything. That is, even by his own testimony, Russillo threatened the employees that the preexisting open-door policy benefit would vanish if they selected the Union as their collective-bargaining representative. Moreover, I have credited the employee testimony that Russillo told the employees that Respondent's open-door policy would no longer be available to them if they selected the Union as their collective-bargaining representative. This was a threat in violation of Section 8(a)(1), and objectional conduct, as I find and conclude.

After the speeches were over, Respondent delivered on Russillo's promise of prescription safety glasses for everyone. Several of the employees who had been denied prescription safety glasses before the meetings, such as Gatheright, received them after the speeches. (And, according to this record, they received them without further requests.) As the grants of prescription safety glasses were in conjunction with the violative promise of the prescription safety glasses, they also violated Section 8(a)(1), as I find and conclude. As prescription safety glasses were apparently received after the election of October 29, however, their grant cannot be considered to be conduct that would have tended to affect the results of the election. See *Ideal Electric*, supra.

Finally, in September Lascala told Rolko and Stevens that they could not talk about the Union on working time, and in October Polisena told the entire packaging department the same thing. As the employees had been free to talk about anything else, including solicitations, on working time, this conduct constituted impositions of discriminatory instructions not to engage in union activities. By this conduct Respondent violated Section 8(a)(1),[7] and by this conduct Respondent engaged in objectionable conduct, as I further find and conclude.

III. THE OBJECTIONS TO THE ELECTION

I find to be valid the objections based on the following of Respondent's conduct, all of which occurred during the period between the filing of the petition on August 19 and the election of October 29: (1) Respondent's discriminatory instructions not to engage in union solicitations on working time; (2) Respondent's threat to withdraw the preexisting benefit of the right to confer with management about grievances; (3) Respondent's promise of a second shift; and (4) Respondent's promise of prescription safety glasses for all employees. All of this conduct reasonably would have interfered with the free choice of the employees. I therefore conclude that the election held of October 29 must be set aside and that a new election be held at such time as the effects of the unfair labor practices found herein are dissipated to the extent that a free and fair election may be held.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Ben Venue Laboratories, Inc., Bedford, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the loss of the right to confer with management about grievances if they become or remain members of International Chemical Workers Union (the Union) or because they have given assistance or support to that labor organization.

(b) Interrogating employees about their union memberships, activities, or desires.

(c) Promising employees prescription safety glasses, or the institution of a second workshift, or any other benefits, in order to dissuade employees from becoming or remaining members of the Union or giving any assistance or support to it.

(d) Imposing on employees discriminatory rules against soliciting for the Union on working time.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[7] See *Atlas Metal Parts Co*., 252 NLRB 205, 210 (1980).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Post at its facility in Bedford, Ohio, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the election conducted on October 29, 1993, in Case 8–RC–14955 be set aside. A new election shall be held at such time as the Regional Director decides that the circumstances permit the free choice of a bargaining representative.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''